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ABSTRACT

This conference paper analyzes the least restrictive environment (LRE) provisions in the Individuals with Disabilities Education Act (IDEA) and reviews and compares the standards created by different Federal Circuit Court decisions on LRE. The following cases are analyzed: (1) Briggs v. Board of Education, which deferred to the public agency's discretion regarding LRE; (2) Board of Education v. Rowley, which created a four-factor test on the appropriateness of delivering related services; (3) Daniel R. R. v. State Board of Education, which requires a court to examine whether a public agency has taken steps to accommodate the child with a disability in a regular education classroom and, if the public agency is providing supplementary aids and services, whether its efforts are sufficient; and (4) the Rachel Holland case, which created a four-factor balancing test. The result of this analysis finds that the most appropriate LRE standard is the standard created by the Daniel R. R. case because it permits judicial involvement in LRE decisions, distinguishes LRE decisions from free appropriate public education decisions, adheres faithfully to the language of the IDEA and its implementing regulations, and considers appropriate factors. (Contains 16 references.) (CR)

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WHAT SHOULD THE "LRE" STANDARD BE?

Paper presented at the 1997 Annual Meeting of AERA

Sohn, Heekwon

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I. INTRODUCTION

According to the First Amendment, children with disabilities have the right to free association with those without disabilities. The Supreme Court ruling against "separate but equal" treatment for races can be applied to children with disabilities (Brown 1954, p. 483). To respect the rights of free association and the Brown Court decision, the Individuals with Disabilities Act (hereafter IDEA) requires a public agency to educate children with disabilities in the "least restrictive environment (hereafter LRE)" to the maximum extent appropriate (Heise 1984, pp. 112-114; Trumbull III et al. 1982, pp. 164-165, 169).

This "LRE" requirement is the major source of much special education litigation. To cope with such litigation, it is necessary to identify the standard to determine whether a public agency has met it. However, to date the United States Supreme Court has not identified such a standard. Various Federal Circuit Courts have suggested somewhat differing standards.

The lack of a Supreme Court standard and some differences among Federal Circuit Courts' standards have caused confusion about the precise meaning of "LRE." This confusion has increased conflicts between school districts and parents in developing

Individualized Education Plans (hereafter IEPs).

To reduce such confusion and conflict, it is essential to identify the most appropriate standard to determine whether a public agency has met the IDEA's "LRE" requirement. To identify this standard, I will analyze the IDEA's "LRE" provisions and review and compare the existing "LRE" standards.

II. IDEA's "LRE" PROVISION

The IDEA 1412(5)(B) states that:

> The State shall demonstrate to the Secretary that the following conditions are met: The State has established procedures to assure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular classroom environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

This statement consists of two key prolongs: (1)mainstreaming to the maximum extent appropriate, and (2)no removal from regular education unless education in a regular classroom environment with the use of supplementary aids and

services cannot be achieved satisfactorily (Julnes 1994, pp. 600-601; Northrup & Oxendins 1987, p. 909).

III. EXISTING "LRE" STANDARDS

To date the Federal Circuit Court has addressed four different "LRE" standards.

A. Briggs Standard

On the basis of the Rowley decision, the Second Circuit Court recommended that the court should defer to the judgment of a public agency concerning the IDEA's "LRE" requirement (Briggs 1989, pp. 689-691). Specifically, the United States Supreme Court in Rowley (1982) was reluctant to interfere with the public education agency's professional judgment on educational methodology (pp. 207-208), and from the viewpoint of the Second Circuit Court, the "LRE" is related to such methodology. Therefore, the central message of the Briggs standard is deference to the public agency's discretion regarding "LRE."

B. Roncker Standard (Portability Test; Feasibility Test)

The Sixth Circuit Court argued that the Rowley standard is inapplicable to "LRE" decisions, because the issue of whether the education of a child with disability is appropriate is different from that of whether the child has been placed in compliance with the mainstreaming mandate (Roncker 1983, p. 1062). Therefore, this circuit court suggested its own "LRE" standard, the so-called portability or feasibility test, on the basis of the Campbell decision (Roncker 1963, p. 1063):

> In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasiblely provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the IDEA.

The Roncker standard suggested the following factors to determine such appropriateness: (1)whether the child would benefit from mainstreaming; (2)whether the benefits from mainstreaming would be far outweighed by benefits of receiving services not available in the mainstreaming setting; (3)whether the child would be a disruptive force in the mainstreaming setting; and (4)the cost of mainstreaming the child (Roncker

1983, p. 1063). However, among these four factors, cost is no defense where the school has failed to use its funds to provide a proper continuum of alternative placements for children with disabilities, since the provision of such alternative placements benefits all children with disabilities (Roncker 1983, p. 1063).

The Roncker standard focuses on the appropriateness of delivering related services. This focus has two weaknesses. First, it makes the distinction between the "LRE" and "FAPE" decisions unclear. Second, it opens the possibility for the court to interfere with the professional judgements of the public agencies by referring to the supremacy of related services, which is related to educational methodology.

C. Daniel R.R. Standard (Two-Part Test; Two-Step Test)

The Fifth Circuit Court agreed with the court in Roncker that the Rowley standard is inapplicable to "LRE" decisions (Daniel 1989, p. 1045). However, the Fifth Circuit Court declined to adopt the Roncker standard, because it was too intrusive an inquiry into the educational policy choices of educators (Daniel 1989, p. 1046). Therefore, this circuit court formulated its own standard, the so-called two-part or two step-test on the basis

of the IDEA and its implementing regulations (Daniel 1989, p. 1989):

> First, courts ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for the child with disability. Second, if it cannot and the school intends to provide special education or to remove the child from regular education, courts ask whether the school has mainstreamed the child to the maximum extent appropriate.

The Daniel R.R. standard consists of two parts, as shown above. Its first part consists of two questions. First, the court should examine whether a public agency has taken steps to accommodate the child with disability in regular education (Daniel 1989, p. 1048). If the public agency has made no efforts to take such accommodating steps, the inquiry of the court ends, for the public agency is in violation of the Act's express mandate to supplement and modify regular education (Daniel 1989, p. 1048).

If the public agency is providing supplementary aids and services and is modifying its regular education program, the next question that the court should examine is whether its efforts are sufficient. To exhibit sufficient efforts, the public agency should modify and supplement regular education broadly, beyond

mere token gestures (Daniel 1989, p. 1048).

The court also suggested the following limits on broad efforts. First, the public agency need not provide every conceivable supplementary aid or service to assist the child (Daniel 1989, p. 1048). Further, regular instructors need not devote all or most of their time to one child with disability, because this devotion makes these instructors special education teachers in a regular classroom environment with results that are detrimental to the entire class, including, perhaps, other equally deserving children with disabilities, who may also require extra attention (Daniel 1989, pp. 1048-1049). Finally, regular instructors need not modify the regular education program beyond recognition, since this modification results in special education in the regular classroom environment (Daniel 1898, pp. 1048-1049).

To determine the second part (mainstreaming the child with disability to the maximum extent appropriate), the court should conduct the individualized, fact-specific inquiry into whether the child with ability has received educational benefits from regular education. For this inquiry, the court suggested three factors (Daniel 1989, pp. 1049-1050): (1)the ability of child with disability to grasp the essential elements of regular

education (academic benefits); (2)the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education (nonacademic benefits); and (3)effects the presence of the child with disability has on the regular education environment. The final factor includes two kinds of effects (Daniel 1989, pp. 1049-1050): (1)whether the child with disability may, as a result of his/her disability, engage in disruptive behavior; and (2)whether the child may require so much of the instructor's attention that the instructor will have to ignore the other students' needs in order to tend to the child with disability.

D. Holland Standard (Four-Factor Balancing Test)

The Ninth Circuit Court did not even consider the Rowley standard, nor did it consider the United States Supreme Court's admonition to refrain from engaging in review of disputes involving educational methodology. Rather, the court approved the Holland standard, the so-called four-factor balancing test, which its District Court developed on the basis of the Roncker and Daniel R.R. standards (Rachel 1994, pp.1400-1401):

1. the academic benefits available to the child with disability in a regular classroom
2. the nonacademic benefits of interaction with children who are not disabled
3. the effects the presence of the child with disability has on the instructor and other children in the classroom
4. the cost of mainstreaming

IV. THE MOST APPROPRIATE "LRE" STANDARD

To identify the most appropriate "LRE" standard, I will compare four Circuit Court standards regarding (1)whether the court should become involved in "LRE" decisions; (2)whether the same standard should be used for "FAPE" and "LRE" decisions; (3)whether each standard adheres faithfully to the language of the IDEA and its implementing regulations; and (4)whether each standard considers the appropriate factors for "LRE" decisions.

A. Whether Should the Court Become Involved in "LRE" Decisions?

Each standard has a different viewpoint on whether the court should become involved in "LRE" decisions. Only the Briggs standard supports deference to a public agency's discretion, because the court in Rowley admonished the lower courts for becoming involved in the public agency's discretion concerning

educational methodology, and "LRE" decisions are related to a choice of educational methodology. The Roncker and Daniel R.R. standards advocate deference to a public agency's discretion concerning educational methodology, but disagreed regarding interference with "LRE" decisions. The Holland standard does not consider this matter.

I support the notion of deference to the professional judgment of a public agency on educational methodology, because such agency and professionals have more expertise in this area than the courts.

However, I disagree with the view that the court should not become involved in "LRE" decisions for the following reasons. First, "LRE" decisions are related not to the choice of educational methodology, but to the choice of place (Melvin II 1995, pp. 163-164). Further, the highly deferential approach in Rowley effectively renders the IDEA's "LRE" requirement ineffective by opening the way for the public agency to avoid mainstreaming a child with disability on the basis of professional judgment. Finally, it is the duty of the court to enforce the statutory requirement (Oberti 1993, p. 1214). Therefore, it would be reasonable for the court to defer to the professional judgment of a public agency concerning educational

methodology but to become involved in "LRE" decisions.

However, in reality, the Roncker standard opened the possibility for the court to interfere with the professional judgment of a public agency concerning educational methodology by permitting the court to compare the supremacy of related services. Hence, the Daniel R.R. standard seems to be better for "LRE" decisions.

B. Whether Should the Same Standard Be Used for "FAPE" and "LRE" Decisions?

All of the three "LRE" standards except for Briggs, agree that the same standards should not be used for "free appropriate public education (hereafter "FAPE": meeting the unique need of the child with disability in the educational setting) and "LRE" decisions. In particular, they share the viewpoint that the Rowley standard for "FAPE" is not appropriate for "LRE" decisions.

I hold the same opinion, for the following reasons. First, the IDEA has two different provisions for the placement of a child with disability, and each provision has its own purpose. "FAPE" is intended to provide the opportunity for education matched with the unique needs of children with disabilities,

while "LRE" is intended to provide the opportunity for free association of such children with those without disabilities in physical, social and instructional aspects. Further, the Rowley standard for "FAPE" decisions assumes the satisfaction of other IDEA requirements (Greer 1991, p. 695). Finally, requiring as a prerequisite to mainstreaming that a child with disability be able to learn at approximately the same level as his/her classmates without disabilities fails to take into account the principles that the Supreme Court upheld in Rowley, because the public school system tolerates a wide range of different learning disabilities and at the same time provides educational opportunities that do not necessarily account for all such different capacities to learn (Daniel 1989, p. 1046). Therefore, it is necessary to distinguish the "FAPE" standard from the "LRE" standard.

However, indeed, the Roncker standard makes the distinction between "FAPE" and "LRE" decisions unclear by focusing on the appropriateness of delivering related services. Therefore, the Daniel R.R. and Holland Standards seem to be better for "LRE" decisions.

C. Whether Does Each Standard Adhere Faithfully to the Language of the IDEA and Its Implementing Regulations?

Each "LRE" standard should adhere faithfully to the language of the IDEA and its implementing regulations for "LRE" decisions, because this faithful adherence clearly reflects Congressional intent (Greer 1991, p.696). However, the standards differ in whether they adhere faithfully to the language of the IDEA's "LRE" requirement.

In the case of the Daniel R.R. standard, its first part is identical to the second prolong of the language of the IDEA and its second part is related to the first prolong. Therefore, the Daniel R.R. standard faithfully adheres to the language of the IDEA's "LRE" requirement and its implementing regulations.

The Holland standard, adheres to the second prolong of the language of the IDEA, because it relies principally on the interpretation of the first part of the Daniel R.R. standard. However, the Holland standard does not mention the first prolong of the IDEA. Therefore, this standard does not seem to adhere faithfully to the language of the IDEA's "LRE" requirement and its implementing regulation.

The Roncker standard does not seem to adhere to the language

of the IDEA and its implementing regulations for the "LRE" requirement for the following reasons. First, it fails to make clear that even if placement in a regular classroom environment cannot be achieved satisfactorily for the major portion of a particular child's education program, the school is still required to include that child in school programs with children without disabilities whenever possible (Oberti 1993, p. 1204). Moreover, it fails to consider the possibility of partial mainstreaming, because the public education agency need only prove the impracticability of full mainstreaming, even though mainstreaming includes three different domains: physical, instructional, and social (Jaffe 1994, p. 400). Finally, it implies an all-or-nothing approach, which also violates the spirit of the IDEA's request for the consideration of a "continuum." Therefore, only the Daniel R.R. standard adheres faithfully to such language.

D. Whether Does Each Standard Consider the Appropriate Factors for "LRE" Decisions?

Each standard except for the Briggs standard, suggests some factors for "LRE" decisions, as shown in the following Table.

TABLE
Factors

Standard	Factors			
	1	2	3	4
Briggs	No comment			
Roncker	O	X	O	O
Daniel R.R.	O	O	O	X
Holland	O	O	O	O

NOTE: 1 = academic benefits, 2 = non academic benefits,
3 = effects the presence of the chid with disability has on regular classroom environment, 4 = cost;
O = considered, X = not considered

1. Common Factors

Except for the Briggs standard, all standards consider two common factors: academic benefits and effects the presence of the child with disability has on the regular classroom environment.

These common factors seem to be reasonable, because they adhere to the language of the IDEA's "LRE" requirement and its implementing regulations. The deciding factor for the IDEA's "LRE" requirement is the nature and severity of the disability of the child (Northrup & Oxendins 1987, p. 909). Such nature and severity can have an impact on the effects the presence of the child has on the regular classroom environment and the academic

benefits the child receives in this environment (Malkay 1985, p. 518).

2. Different Factors

There is disagreement about nonacademic benefits. The Daniel R.R. and Holland standards consider nonacademic benefits, while the Roncker standard does not. However, it is reasonable to consider nonacademic benefits, because the purpose of the IDEA's "LRE" requirement is to provide children with disabilities with all three kinds of mainstreaming (academic, physical and social) to the maximum extent appropriate, in that such children have the opportunity to receive benefits from physical and/or social mainstreaming, such as language and role modeling, social and communication skills and generally improved self-esteem and children with disabilities have the right to free association with those without disabilities, as assured in the First Amendment.

Three standards also show disharmony about whether cost should be a legitimate factor in determining whether a public agency has met the IDEA's "LRE" requirement: the Roncker and Holland standards consider cost as such a factor, while the

Daniel R.R. standard does not. There was even disagreement among the Federal Circuit Courts that used the Daniel R.R. standard: the courts in Daniel R.R. and Oberti did not address cost (Daniel 1989, pp. 1048-1050; Oberti 1993, p. 1216), while the court in Greer (1991) did (p. 697).

The courts in Greer and Roncker presented two reasons why cost should be a legitimate factor in determining whether a public agency has met the IDEA's "LRE" requirement (Greer 1991, p. 697; Roncker 1983, p. 1063). First, as the United States Supreme Court noted in Rowley, the Congress did not intend for a public agency to furnish "every special service necessary to maximize each child with disability's potential (Rowley 1982, p. 199). Second, if the cost of educating one child with disability in a regular classroom environment is so great that it would significantly affect the education of other children in the school district, then education in a regular classroom environment is not appropriate.

However, I do not consider cost as a legitimate factor for two reasons. First, the IDEA encourages the State to use its own standard which is better than the national standard. The so-called third wave school finance litigation which is based on the state education clause, includes demands for a change in

education policy value to adequacy. Adequacy means quality education, not minimum education, for all, and consequently results in maximizing the potential of all students regardless of whether they have disabilities. Therefore, the Rowley logic cannot be justified under the era of the so-called third wave school finance litigations. This means that cost cannot be a legitimate factor for "LRE" decisions. Second, it would be difficult to distinguish the cost for a particular child with disability from that for other children with disabilities.

V. CONCLUSION

I have identified the most appropriate "LRE" standard. The answer seems to be the Daniel R.R. standard, because it permits judicial involvement in "LRE" decisions, distinguishes "LRE" decisions from "FAPE" decisions, adheres faithfully to the language of the IDEA and its implementing regulations, and considers appropriate factors.

I shall present some suggestions for educational policy. To meet the IDEA's "LRE" requirement, education in the regular classroom environment, with the use of supplementary aids and services, cannot be achieved satisfactorily for the child with

disability, and if it cannot and the school intends to provide special education or remove the child from the regular classroom, the school has mainstreamed the child to the maximum extent appropriate. For the sufficiency of supplementary aids and services, a public agency should take broad steps to accommodate the child with disability within some limits. For the mainstreaming of the child with disability as the maximum extent appropriate, the public agency should consider his or her academic benefits, nonacademic benefits, and effects the presence of the child has on the regular classroom environment.

I shall suggest some questions for future study. What is the scope of supplementary aids and services for the first part of the Daniel R.R. standard? Specifically, should the public agency provide a full continuum of supplementary aids and services, and if "yes," what is the scope of a full continuum: is it only resource rooms and itinerant instruction, or should it be extended to speech and language therapy, special education training for the regular teacher, behavior modification programs, and any other available aids or services appropriate to the child's particular disability?

How should one calculate the three factors considered in the Daniel R.R. standard? For example, how disruptive must the

behavior of children with disabilities' be for them to be removed from the regular classroom? One direction was that the disruptive behavior was attributed to the lack of appropriate support services in the regular classroom, so an inclusive program with appropriate aids was ordered (Oberti 1993, p. 1204). The other direction was that a segregated placement was justified because the behavior threatened the welfare of others and posed liability to the school (Clyde and Sheila 1994, p. 1396).

REFERENCES

Briggs v. Board of Education, 882 F.2d 689-691 (2d Cir. 1989).

Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (1954). Clyde K. and Sheila K. v. Puyallup School District, 35 F.3d 1396 (9th Cir. 1994).

Daniel R.R. v. State Board of Education, 874 F.2d 1048 (5th Cir. 1989).

Greer v. Rome City School District, 950 F.2d 697 (11th Cir. 1991)

Heise, S. (1984). Mainstreaming of Handicapped Children in Education. Journal of Juvenile Law 8 (2) 105-116.

Jaffe, E. M. (1994). A Structure for Legal Interpretation of the Individuals with Disabilities Act: Oberti V. Board of Education, 995 F.2d 1204 (3d Cir. 1993). Journal of Urban and Contemporary Law 46 (3) 391-401.

Julnes, R. E. (1994). The New Holland and Other Tests for Resolving LRE Disputes. West's Education Law Quarterly 3 (4) 600-620.

Lane, J. (1992). The Use of the Least Restrictive Environment Principle in Placement Decisions Affecting School-Age Students with Disabilities. University of Detroit Mercer Law Review 69 (2) 291-322.

St. Louis Developmental Disabilities Treatment Center Parents' Association v. Malkey, 767 F.2d 518 (8th Cir. 1985).

McCarthy, M. M. (1995). Inclusion of Children with Disabilities: Is It Required? West's Education Law Quarterly 4 (2) 270-279.

Melvin II, D. H. (1995). The Desegregation of Children with Disabilities. DePaul Law Review 44 (4) 599-671.

Northrup, L. R. and Oxendins, L. W. (1987). The Education for All Handicapped Act: The Benefits and Burdens of Mainstreaming Capable Handicapped Children in a Regular Classroom. Mercer Law Review 38 (4) 903-924.

Oberti v. Board of Education, 995 F.2d 1204, (3rd Cir. 1993).

Roncker v. Walter, 700 F.2d 1063 (6th Cir. 1983)].

Board of Education v. Rowley, 458 U.S. 199, 102 S.Ct. 3047 (1982).

Trumbull III, R. H., Brotherson, M. J., Wheat, M. J. and Esquith, D. (1982). The Least Restrictive Education for Handicapped Children: Who Really Wants It? Family Law Quarterly 16 (3) 161-200.